IN THE

UNITED STATES

OCTOBER TERM, 1909.

NO. 594

[redacted],

Appellant,

vs. (13,624)

PHILOMIE SMITH,

Appellee.

SAMUEL HERRICK AND HAILEY & LOWELL,

Attorneys for Appellant.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED.....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. _____

HY-YUTSE-MIL-KIN, *Appellant.*	
vs.	No. 596
PHILOME SMITH, *Appellee.*	

BRIEF OF APPELLANT.

STATEMENT.

This is a suit brought by the appellee as complainant in the Circuit Court of the United States for the District of Oregon against appellant to cancel an allotment of land made to appellant on the Umatilla Indian Reservation in Oregon

in 1891, and to have the same allotted to her. The land consists of 160 acres, and was allotted to appellant under a special act of Congress, approved March 3, 1885, providing for the allotment of lands in severalty to the Indians residing upon said reservation.

The plaintiff claims her right to bring suit under the act of Congress approved August 15, 1894, conferring jurisdiction upon the United States Circuit Courts to determine the rights of claimants to allotments on Indian lands.

In her complaint she claims that at the time the lands were allotted to appellant she was a full blooded Indian woman, and a member of the Walla Walla band of Indians, and the head of a family, and resided upon said Umatilla Reservation, upon the particular tract of land allotted to appellant, and that prior to said allotment she settled upon, took possession of, and enclosed and made extensive improvements upon said tract of land, which is described as the southeast quarter of section 20, Tp. 3 north, of range 34, E. W. M.; and that at the time of the allotment she was residing upon and had actual possession of said tract, and that when the allotting commissioners were allotting, she went to them and selected said tract as her allotment, but that they refused to allot it to her, and wrongfully allotted it to appellant, and that she made her selection of this land before appellant did, and that he selected this tract, knowing that she had already selected it.

The appellant contends that appellee is not a member of the Walla Walla tribe of Indians, and never resided upon the Umatilla Reservation until 1888, three years after the passage of the allotment act, and one year after the allotment lists were completed, and that she did not settle nor reside upon the tract of land allotted him, but upon a separate tract south of appellant's allotment, and separately enclosed from his land, and that she never selected the tract allotted to him, and never cultivated the same prior to his allotment, and never made application to be allotted, but did make an application sometime after 1888 to be listed among those entitled to allotment, and also to be adopted

by the confederated tribes upon said reservation, and that appellant selected the land and was allotted upon it by the commissioners, and thereupon took possession of the land, and ever since has been in possession thereof, and that after the allotment of these lands to appellant the appellee's application made to the Secretary of the Interior to be listed as one entitled to an allotment was granted, and she thereafter, upon notice from the Secretary of the Interior, selected an allotment on another piece of land, which was allotted to her and accepted by her, and which she has ever since held and rented as her allotment.

Before referring to the facts of the case we desire to call the Court's attention to the terms of the treaty and Act of Congress governing the Umatilla Reservation and the allotments thereon, in order that the appellant's contention regarding the rights of allotment and selection thereon may be the more readily understood. Our contention is that only such Indians as actually resided upon the reservation at the time of the passage of the act and were recognized members of the confederated tribes thereon were entitled to allotment. In 1855 a treaty was concluded by the Government with the confederated Walla Walla, Cayuse, and Umatilla Indian tribes wherein said Indians ceded to the Government certain territory therein described, and "had set apart as a *residence* for said Indians" a certain tract within the ceded territory "to be held and regarded as an Indian Reservation," which tract included the present diminished reservation; and "said tribes and bands agreed to remove to and settle upon the same within one year after the ratification of this treaty."

In Article 2 of the treaty the Government agrees to pay certain sums to "the bands and tribes of Indians claiming territory and residing in said country, and who *remove to and reside upon said reservation.*"

In Article 3 and 4 of the treaty provision is made for the erection of buildings, fencing, opening farms, purchasing teams, farming implements, clothing, and provisions, saw-

mill, flouring mill, school books, etc., and to employ two school teachers.

Article 6 referes to this reservation as "a permanent home for those Indians," and provides for assigning definite tracts to individuals for homes and issuing patents therefor, and "that if any person or family shall at anytime neglect or refuse to occupy or till a portion of the land assigned and on which they have located, or shall roam from place to place, indicating a desire to abandon his home, the President, may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family their portion of the annuities or other money due them until they shall have returned to such *permanent* home and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of Indians residing on said reservation," thus showing that the intention of the treaty was to compel these Indians to make the reservation their permanent place of residence.

The Act of 1885 under which appellee claims her right to an allotment, in its title declares the purpose of the Act to be "to Provide for the Allotment of lands to the Indians *residing* upon the Umatilla Indian Reservation," and the first section of the Act provides "that the President of the United States cause lands to be allotted to the Indians *residing* upon the Umatilla Reservation" and that he appoint a commission "to go upon said reservation and estimate as near as may be the number of Indians who *will remain* on said reservation, and who shall be entitled to take lands in severalty thereon, and the amount of land required to make the allotments;" and the commission should set apart the land for allotments, pasturage, and timber, including 640 acres for an industrial farm or school, but not to exceed 120000 acres in the aggregate for all purposes. "This tract shall be surveyed and as soon as the surveys are approved by the Secretary of the Interior the selections and allotments shall be made." This clearly shows, along with

the spirit of the treaty, that the allotments were intended for the benefit of those Indians who were residing upon the reservation at the time of the passage of the Act, and not for persons who had never been residents thereon.

The appellee claims to have been born at Wallula, the point of confluence of the Walla Walla River with the Columbia River, in what is now the State of Washington, and some forty miles distant from the Umatilla Reservation, and admits that she never was on the Umatilla Reservation until she came there in the year 1888 to take land, and that she had been living from the fall of 1860 until 1888 at or near The Dalles, on the Columbia River, a point 150 miles from the Umatilla Reservation, and not even within the territory ceded by the Indians in 1855, but sixty or more miles west of the most western line of the ceded section. That prior to her removel to The Dalles in 1860 she had lived with her mother from early childhood at St. Paul, French Prairie, an old Hudson Bay trapper settlement near Salem, the capital of this State, and distant at least 280 miles from the reservation, and beyond the Cascade Mountains. That in 1888, a year after the allotment list had been made up, she came, with her family and husband, who is a white man, and settled upon the Umatilla Reservation, for the purpose of getting land under this allotment Act, and she claims to be entitled to an allotment on the ground that her mother was a member of the Walla Walla tribe of Indians, her father being an Iroquois trapper. The testimony of the tribal relations of her mother is almost entirely confined to the statements made by the mother herself, as the appellee personally knows nothing of her mother's tribal relations, and the appellee herself testifies that her mother was a half Walla Walla and a half Umatilla Indian, while one witness testifies that the mother of appellee belonged to the Wallula or Walla Walla tribe, but she does not say which, and in one place testifies that her father belonged to the Blackfeet Indians, and in another place that he was an Iroquois. The testimony of appellee clearly shows that her mother never maintained tribal relations

with any tribe of Indians whatever, but traveled from place to place with her trapper husband until his death, and after that lived at St. Paul, French Prairie, until 1860, and thereafter lived with her daughters and their white husbands at The Dalles, Oregon, until her death, and that she never was on the Umatilla Indian Reservation.

The testimony in regard to the selection of the allotment upon the reservation clearly shows that appellee and her husband. who is what is commonly known as a "squaw man," and whom she married, according to his testimony, when she was only 13 years old, had been residing at The Dalles, Oregon, for over 27 years, when they heard of the allotment of lands upon the Umatilla Indian Reservation, whereupon they came to the reservation, and her husband, acting for her, made application to the allotting commissioners to have herself and family listed among those who were entitled to allotments, but, not having been a resident of the reservation at the time the allotting list was made up, her application to be listed was submitted to the Secretary of the Interior, and under instructions from him it was denied. The testimony of Mr. Eddy, one of the allotting commissioners, is that she did not personally make any application, and that the only application made was by her husband to have her listed as one entitled to an allotment, that she did not make any selection of land for allotment. Her own testimony and that of her husband is that she never resided upon the lands allotted to the appellant, but did reside upon the northeast quarter of section 29, Tp. 3 north, of range 34, E. W. M.., in a field separately enclosed, south of the appellant's allotment, and that prior to the allotment of the land to appellant she had never cultivated any portion of the tract, but her husband had used it, in connection with other lands, for a pasture, and the only improvement placed upon it was a well dug by her husband and another man for their mutual benefit.

The only testimony that appellee, prior to the allotment of this land to appellant, had selected this land for allotment and made application to the allotting commissioners to be

allotted thereon is the testimony of her husband, which is positively contradicted by the allotting commissioner, Eddy, who says that prior to the time the land was allotted to appellant Mrs. Smith did not apply for an allotment, that she merely applied to be listed as an Indian, and that the commissioners had a list of all the Indians upon the reservation that was taken by the commission sent out some years before, and they were directed to allot lands to persons whose names were on that list still alive on the 14th of April, 1891, and that a subsequent list had been made and sent to them with Mrs. Smith's name and those of her children on it, and they had taken the testimony of the Indians in relation to the rights of these people, and reported it to the Commissioner of Indian Affairs, and he had directed them to make no allotments to these people, as they were not entitled to lands.

He also states that he is practically certain that there was no fence around the lands allotted to appellant at the time it was allotted to him, and this is the testimony of appellant himself and of Albert Minthorne, an educated Indian who testified in the case. Against this testimony is the sole testimony of appellee's husband, as all of the transactions between her and the allotting commissioners were conducted by him, she being unable to speak English.

The testimony further shows that after the allotment of these lands to appellant the appellee made application to the Department of the Interior for an allotment upon the Umatilla Reservation, and her application was granted, and she selected a separate tract of land, which was allotted to her, and which she has since enjoyed.

The testimony in this case was taken before a special commissioner appointed by the Court, and the Court will note from the transcript of the record that the tesimony of the witness Susan Gangnon on page 124 and of the appellee and her husband on pages 156-7 and Ed Brisbow on page 158 is practically taken *ex parte*.

The referee made his Findings of Fact and reported them to the Court, and they are found on pages 31 to 45 of the transcript of the record, and the exceptions thereto made by the Hon. John H. Hall, United States Attorney, appearing for the appellant, are found on pages 46 and 47, which exceptions we contend were well taken, and upon which we still insist. The exceptions raise combined questions of law and fact, as follows:

I.

That the appellee is not a member of the Walla Walla tribe, and never resided upon the Umatilla Reservation, and therefore is not entitled to any allotment thereon.

II.

That she never settled upon or selected or resided upon the land allotted to appellant, and never had possession thereof, and never requested the allotting commissioners to allot said land to her.

III.

That the appellee afterwards applied for and was allotted upon other lands selected by her, and has ever since occupied and enjoyed the same, and still has the same.

Upon this appeal appellant expects to rely upon the following

ASSIGNMENTS OF ERROR.

I.

Error of the lower Court in over-ruling appellant's demurrer to the bill of complaint, which demurrer raised the questions of insufficiency of facts stated in the complaint and want of jurisdiction of the subject matter. The insufficiency

of the facts in the complaint consisting of a failure to allege residence on the part of complainant upon the Umatilla Indian Reservation at the timeof the passage of the Allotment Act on March 3, 1885,and want ofjurisdiction over the subject matter of the suit by reason of the Act of August 15, 1895, upon which complainant's right is based, not being applicable to the facts in this case, it being prospective in purpose, and not retrospective, and this matter having been settled by the Secretary of the Interior before the passage of such Act, is therefore *res adjudicata*.

II.

Errer in entering a decree herein, for the reason that the United States was and is a necessary and indispensable party defendant herein, and is not a party hereto, the United States being the holder of the legal title to the land in controversy, and trustee, with an active duty to perform, of such land, for the benefit of the allottee.

III.

Error in over-ruling the exceptions to the Findings of Fact made by the special examiner, specified on pages 148 and 149 of the transcript of the record herein.

IV.

Error in decreeing that the report of said special examiner be confirmed, and in setting aside the allotment of the lands in controversy to the appellant herein, and decreeing that said lands be allotted to the appellee, and awarding costs to her.

V.

Error in refusing to enter a decree dismissing plaintiff's Bill of Complaint.

In support of the foregoing contentions we cite the following

POINTS AND AUTHORITIES.

I.

The Act of August 15, 1894 (28 Stat. 305), upon which complainant bases her right to bring suit, is not applicable to cases of this kind, where the decision of the Secretary of the Interior denying her allotment was made before the passage of such Act. Such Act is prospective in charactor, and confers a special jurisdiction where none existed before, and must be strictly construed, and fixed rights cannot be disturbed by it, nor prior decision of officers excercising proper powers be set aside. It relates to the future, and is not retrospective in effect.

Endlich on Interpretation of Statutes, Sec. 209, page 392.

6 Am. & Eng. Ency of Law, 939, 2 Ed.

Farrington vs. Tennessee, 95 U. S. 379.

Chew Heong, vs. U. S., 112 U. S. 536.

Smith vs. Lyon, 44 Con. 175.

Dyer vs. Belfast, 80 Me. 140.

Dash vs. Van Kleeck, 7 Jhon. 477.

Vanderpool vs. Ry. Co., 44 Wis. 663.

Act of August 15, 1894 (Stat. 28,-305)

II.

The Act of March 3, 1885, applies only to the Indians residing upon the Umatilla Reservation at the time of its passage, and then members of the confederated tribes there-

on, and not to persons who came there afterwards seeking allotments, who had never resided there.

Treaty of June 9, 1855 (12 Stat. 945.)

Act of March 3, 1885 (33 Stat. 340.)

Sloan vs. U. S., 85 Fed., 197.

Sloan vs. U. S., 118 Fed. 287, 291-2.

III.

The United States is a necessary and indispensable party defendant herein, being the original source of title, the holder of the legal title, a trustee under a special statutory trust, and the allotting power, with the active duty of protecting the possession of the allottee.

Act of March 3, 1885 (23 Stat. 340, sec. 1.)

Act of August 15, 1894 (28 Stat. 305.)

U. S. Rev. Stats, Sec. 2119.

U. S. vs. Flournoy Cattle Co., 69 Fed. 886.

U. S vs. Mullan, 71 Fed. 682.

22 Ency. Pl. and Pr., 161, and cases there cited.

ARGUMENT.

The first contention on the part of the appellant in this case is that the complaint does not state facts sufficient to constitute a cause of suit against defendant, in that it does not allege that the complainant was a member of the

Walla Walla tribe of Indians, and resided upon the Umatilla Indian Reservation at the time of the passage of the Allotment Act, to-wit: March 3, 1885. The undisputed fact is that neither she nor her mother ever resided upon that reservation prior to 1888. The undoubted purpose of the treaty of 1855, which is pleaded by the complainant, was to make the Umatilla Reservation a permanent home for the confederated tribes and their members, and all Indians who did not accept its terms, and remain permanently upon the reservation, forfeited their rights to the benefits of the treaty. Provision was made by that treaty for this particular section as an exclusive home for the Indians, free from white intrusion, where they were provided with the means of becoming civilized and of learning habits of industry and thrift, and the plain intention was to establish the Indians in homes and have them become permanent residents of such homes. The Act of 1885 provided for the allotment of lands to the Indians *residing* upon this reservation, in accord with the spirit of the treaty, and is only a more elaborate provision for the Indian when he had reached a more advanced stage of civilization. It is limited, both in the title, preamble and in the body of the Act, to the Indians then residing upon the reservation, and under Sec. 5 thereof before it shall be executed in any part the written consent of said Indians signed by a majority of the male adults upon said reservation, and by a majority of their chiefs in council assembled for that purpose shall be obtained and filed with the Secretary of the Interior. As stated in the case of Sloan vs. U. S., 95 Fed. 197. "In view of the situation and the several provisions of the act there may be good ground for holding that only those Indians residing on the reservation when the Act of 1882 was adopted and their after-born children are or can become entitled to allotments under its provisions," and these words are more applicable to the treaty and act regarding the Umatilla Reservation than the Act to which they were applied governing the Omaha Reservation.

By the treaty of 1855 the benefits were only conferred upon those Indians "who removed to and reside upon said reservation," and under its terms all assignments of lands made to families were forfeited by their neglecting or refusing to occupy or till the lands assigned. If, then, the benefits of the treaty were limited to those Indians who became residents of the reservation, and even the rights of such resident Indians were forfeited by roaming from place to place, the true intent of that treaty would seem to be that those Indians who did not comply with its terms were entitled to no privileges upon the reservation, and the complainant and her mother never having availed themselves of the terms of the treaty, then complainant, having never lived upon the reservation until after the Allotment Act was passed and the allotting lists had been prepared, surely could not be such an Indian, even admitting that she were originally of the Walla Walla tribe, which we do not admit. Therefore not having alleged her residence upon the reservation at the time of the passage of the allotment Act, and never having resided upon the reservation until after that time, her complaint is insufficient, and the evidence does not supply facts sufficient to warrant any relief to her.

The decree of the Court of Appeals entered in this case is largely based on the contention that the Secretary of the Interior had an erroneous view of the law when he denied to the appellee an allotment in the first instance, because she was not residing upon the reservation when the commission appointed for that purpose made up the lists of those entitled to allotments. We contend, however, that the Secretary of the Interior was right, and the Lower Court has taken an erroneous view of the law.

Before the complainant in this case is entitled to recover she must first prove that she is entitled to an allotment, and next that she actually settled upon and selected the lands in controversy for her allotment prior to the time the same were selected by the appellant.

In the first instance it is necessary for her not only to prove that she was a member of the Walla Walla tribe of

Indians, but also that she was residing upon the reservation at the time of the passage of the Allotment Act. Neither of these propositions has been proved. The only proof of her tribal relations is the testimony of her husband, who is a squaw man, and married her when she was only thirteen years old, and from that fact alone, aside from his vital interest in the success of her contention, a witness whose testimony must be received with caution. The most, however, that he can say is hearsay testimony of his wife's mother that she was a Walla Walla Indian. This we contend is not competent, to prove her status. Her husband testifies (page 58 of transcript) that his wife's mother claimed to be a Walla Walla Indian, while his wife says (page 81, transcript) that she was half Walla Walla and half Umatilla, and again Susan Gagnon testifies (page 125, transcript) that she belonged to the Wallula or Walla Walla tribes, but does not say which. But the testimony of this latter witness is clearly unreliable, for she says she knew the appellee at the time Dr. Whitman was killed near Walla Walla, and that Mrs. Smith was there then, and that she also knew her mother, and that Mrs. Smith was then small—"just about that size (indicating about three feet)," but the testimony of appellee's husband is that she was thirteen years old when he married her in 1861. If that is so, she was born in 1848, which was a year after the death of Dr. Whitman, who was massacred in Dec., 1847 (Gray's History of Oregon, page 54). This witness does not remember the name of Mrs. Smith's mother, and says that she was pretty small when they left. Certainly little credence can be placed in her testimony.

The whole testimony, then, as to the tribal relations of the appellee amounts to the hearsay testimony of her mother, which was contradicted by the admitted fact that her mother was married to a trapper of the Iroquois race, and travelled from place to place and made her home with him at St. Pauls, near Salem, Oregon, where he died, and where the appellee lived until the fall of 1860, when she went with her family to The Dalles, Oregon, where some of them

had "taken up a ranch" on the Columbia River, and where she lived until coming to the Umatilla reservation in 1888. Upon this showing we contend that there is no evidence that she ever was a nember of the Walla Walla tribe, and the testimony of witness Albert Minthorne and the appellant himself, coupled with the testimony of Mr. Eddy, the allotting commissioner, clearly show that the Indians did not recognize her as a member of their tribe. The fact that Homely and one or two chiefs, according to the testimony of Smith, consented that they should select lands, amounts to nothing in the face of the testimony of the witness, Brisbois, which clearly discloses the fact that for a money consideration these chiefs were willing to comply with the wishes of squaw men in regard to the selection of lands. But the action of the chiefs was not the action of the tribes, and cannot be binding upon this appellant as a member of the tribe.

We maintain, therefore, that the first requisite to a recovery in this case on the part of the appellee is wanting in this; that she has totally failed to prove by competent testimony that she was a member of the Walla Walla tribe of Indians, or that she ever resided upon the Umatilla Reservation prior to the year 1888.

The further fact in evidence that her mother spoke French, German and Chinook and that she herself only spoke French and Chinook and not Walla Walla, clearly shows that she was not a member of that tribe, and there is no evidence that her mother spoke the Walla Walla language, for neither she nor her husband understood that tongue, and could not say whether her husband spoke it or not. These facts we deem to be strong evidence condradicting the claim of the appellee of being a member of the Walla Walla tribe. She was not listed in the original list provided for under the Act of Allotment, and she was never recognized by the Indians in their councils as a member of their tribe or entitled to allotment. She and her husband came, as did many other squaw men from all over the Northwest, to this reservation when they heard the lands were open for allotment

and pitting their keen wits and experience against the ignorance and lack of appreciation of land values on the part of the Indians, endeavored to procure through false and flimsy claims rights to allotments to the most valuable lands upon the reservation, and to displace the resident and ignorant Indians, for whose benefit the Allotment Act was passed.

The only testimony as to the priority of selection on the part of the appellee of the lands in controversy is that of her husband, who acted for her through-out, he being a white man, and having no rights on the reservation.

It is true that she testified that she spoke to the allotting commissioner regarding her case, but when the testimony of herself and her husband is analyzed, it clearly appears, owing to the fact that she could not speak the English language, but only French and Chinook, that all business transactions were done by her husband, and although he claims in his testimony to have requested the allotting commissioners to allot her upon this particular tract of land, the testimony of J. B. Eddy, the only surviving allotting commissioner, (page 140) directly contradicts all his testimony to that effect. Mr. Eddy testifies that prior to the time the lands were alloted to appellant, appellee had never demanded that the lands be allotted to her, and that at the time she was not residing upon these lands, but "just across, on the quarter section immediately south of the quarter section claimed by Hy-yutse-mil-kin," and that the only improvements upon the lands allotted appellant, with the exception of a furrow that was plowed around it, was a "kind of shed—a little shed of some sort; a small affair," and on cross-examination he testifies that she did apply to be listed as an Indian, but their instructions from the commissioners of Indian Affairs were to allot lands to all persons whose names were on the list taken by the listing commission. This testimony is practically corroborated by

Smith and his wife, as Smith says that his wife never lived upon that particular tract, but did "live right across from that, on another piece of land," and as all of the witnesses in referring to the location of the residence of appellee, use the words "across," there was evidently a road running between the two pieces of land.

A close reading of the testimony of Smith will also show that the only improvements placed by him upon the land in controversy was the well he and one Wilson dug, and the small shed referred to by Mr. Eddy, all other improvements having been placed on the northeast quarter of section 29, where his own testimony shows that he lived, while his testimony also shows that he never cultivated the land in controversy, but only used it, in connection with other unfenced lands, for pasturage, while as a matter of fact the entire section of country there was pasturage at that time. He never fenced the land, as is clearly shown by the fact that he only built a line of fence a mile and a quarter long, wheeras two miles would be necessary to fence the land, and that he did not build his fences until after the allotment to the appellant is shown by his claim that he built the fences in conjunction with John Ralston and one McDaniel, who were white men and who purchased lands from the Government under the Act of March 3, 1885, which provided for the sale of said lands upon the Umatilla Reservation as well as for allotments to the Indians, and this sale did not take place until April, 1891. This fact clearly shows that there was no fencing around the land when the allotment was made to appellant, a fact which is also testified to by Albert Minthorne, the appellant himself and Mr. Eddy. The weight of testimony is clearly against the contention of the appellee regarding her priority of selection.

Appellee introduced in evidence, "Exhibit A," found on page 110 of the transcript, being the opinion of the assistant Attorney General of the United States upon an *ex parte* showing made before the Secretary of the Interior by the ap-

pellee, and certainly incompetent for any purpose and being, as we contend in the first part of this argument, an opinion contrary to the Act of March 3, 1885, governing the allotment of lands upon this reservation.

In the first place, it is based upon an eroneous assumption of fact. On page 118 of the transcript in this opinion it is said "The fact they did not reside on the reservation is likewise immaterial, in view of the property right granted them under the treaty of 1855, of occupancy in common with others of any of the lands theretofore occupied by them that were not claimed by private individuals."

The Honorable Assistant Attorney General clearly misconceives the facts in regard to this case upon this point. According to the testimony of the appellee and her husband, she never occupied, after the treaty of 1855, in common with others or otherwise, any of the lands theretofore occupied by the Walla Walla tribe that were not claimed by private individuals, but on the contrary, resided at St. Pauls, in Marion County, Oregon, in an entirely different section of the state, and at The Dalles, Oregon, as stated in the beginning of this brief a point more than 150 miles distant from the reservation, and more than 60 miles distant from the most western boundary of the country occupied by this tribe.

Therefore, we contend that the opinion of the Assistant Attorney General is erroneous, both in its assumption of facts and in its interpretation of the law. The law clearly contemplates that allotments should be made to those Indians *residing* upon the Umatilla Indian Reservation at the time of the passage of the Allotment Act. The mere fact that a few of them were absent from home when the listing commission came upon the reservation is no evidence that they did not reside there, for it is a well-known fact that upon all the reservations in our land during the summer season the Indian residents betake themselves to the mountains, and hunt for game and gather berries.

III.

We further contend, as matters of law;

FIRST:—That the Act of Congress dated August 15, 1894 (29 Stat. 305) has no application to this case, as to so hold it makes said Act retrospective in effect, while its purpose is prospective.

SECOND:—That in all suits of this character the United States is a necessary party defendant.

Prior to the passage of the Act of August, 1894, the sole "power to determine all disputes and questions arising between Indians respecting their allotments" was lodged in the Secretary of the Interior, and by his decision made in 1891 in favor of the appellant's allotment upon the land in controversy this matter was finally determined, and the allotment to the appellant gave him a vested right therein, which can no more be disturbed than can a decision of a Court made under a statute which has been afterwards supplanted by another statute conferring jurisdiction over such matters upon another Court. To hold the Act of August 15, 1894, applicable to this allotment would make the latter retroactive in effect, and, if appellee's contention should prevail, would deprive appellant of his vested right. The reasonable intention of such law is clearly prospective, and, in its language, gives the Courts "jurisdiction to try and determine any action, suit or proceeding *arising* within their respective jurisdictions." This language looks to the future, not to the past; to what is coming, not what is gone. Such being the purpose of the Act, the appelle has no standing in Court, for her claim against appellant is *res adjudicata* by the decison of the Secretary of the Interior, so far as this allotment is concerned, and her claim against the Government for an allotment has been satisfied by other lands selected by and allotted to her.

To give retro-active effect to this statute would open anew all claims to allotments on every reservation, and permit a review by the Courts of all the decisions of the Secre-

tary of the Interior made prior to this Act, would disturb hundreds and thousand sof existing allotments, would make it possible, under these old claims, to contest all sales made by Indian heirs under the Act of May 27, 1902, and would make endless trouble, and fill the United States Circuit Courts with numberless allotment contests,—a result most appalling to contemplate in its far-reaching and injurious effect upon existing rights of the Indians. Congress surely had no intention of reviving old matters, the apparent intention being to provide a legal forum wherein the rights of claimants to future allotments could be adjudicated before the Courts, and the laws under which they were made eonstrued by Judges versed in the law, rather than by executive officers who frequently are not lawyers, and providing a special jurisdiction for the determination of such matters in order that the decisions might be uniform upon the interpretation of such laws. The clear intent being not to interfere with decisions of the Department already made, but only such as might arise in the future. We therefore contend that this Act has no application whatever to this case.

We further contend that the United States is a necessary party defendant herein. Under the Allotment Act of March 3, 1885, the United States becomes trustee for the allottee, and has an active duty to perform in protecting the allottee in his possession of the land, and keeping it free from incumbrances and so conveying it at the end of twenty-five years to the allottee, or his heir. This active duty was exercised by the United States in ousting trespassers from allotments on the Omaha and Winnebaggoe Indian Reservations, in the case of U. S. vs. Flournoy, Cattle Co., 69 Fed. 886, under an Allotment Act similar to the one governing this reservation. Being such trustee the United States was a necessary party defendant, and the only relal defendant. The Act of August 15, 1894, under which appellee brought this suit, surely did not contemplate that suit should be brought against the person alone to whom an allotment had been made by the Government without making

the allotting power, the United States a party. The appellant had no power of allotment, and a decree in a suit against him alone could only determine the rights between the parties to such suit, and not establish any right between the claimant and the allotting power. If it was intended that the United States should not be a necessary party to such a suit, against whom, then, could a claimant bring suit when he had simply been denied an allotment of land by the Secretary of the Interior, which had not been allotted to anyone else? The amendment to the Act of Angust 15, 1894 (Feb. 1901, 31 Stat. 760) makes the claimant as plaintiff and the United States as party defendant the only necessary parties to such a suit, and this amendment is a legislative interpretation of such original Act, practically declaring that the United States is the only necessary party defendant in such suits. As amended, the allottee is not a necessary party under the Act. The language of the amendment is specific and clear. If Congress had considered the amendment as naming an additional party defendant, the words used would have been words of addition, aud not of limitation. Statutes are presumed to guard against fraud and imposition, and especially so in all laws dealing with the rights of the Indians. If the United States is not a necessary party is suits of this character, a wide door is opened for fraud and imposition upon the ignorant Indians by squaw men and unscrupulous persons.

Suits based upon such claims can be instituted against the uneducated blanket Indians as sole defendants, decrees enterred, and allotments cancelled and assigned to the claimant, who may have no rights whatever and under the interpretation of this Act as made by the Lower Court such decree would be binding upon the United States, which holds the land as trustee for the allottee.

Again, by such interpretion fictitious defendants might be used, and unallotted lands secured by claimants possessing no rights to allotment. Making the United States a necessary party defendant closes such door for fraud, protects the allottee, and enables the United States as trustee

to do its duty. We therefore contend that the United States was and is the holder of the legal title herein, and the source from which all title emanates, and as such a necessary party defendant herein, and that no binding decree can be entered until it is made such party defendant, and brought before the Court.

The right to bring such a suit is purely statutory, and dependant upon the Act of August 15, 1894, creating a special jurisdiction for such cases (Sloan vs. U. S., 95 Fed. 197). The right of a Court of Equity to correct mistakes and relieve against frauds and impositions and to give relief in cases where it is clear that the officers of the Land Department had made a mistake in the law on the undispnted facts depriving one of his right, as declared in the case of Shepley vs. Cowan, 91 U. S., 330, has no application to such cases as this, where the legal title to the land in controversy is still in the Government. Such right of a Court of Equity only exists where the legal title has passed from the Government, and not in cases where the Government still holds the legal title under a special statutory trust, as in this instance. The right of action in this case is statutory only, and being for the purpose of securing an allotment from the United States of land owned by the United States and held in trust by the Governmen for the allottee, such suit must be brought against the trustee and party from whom the title is derived; that is, the United States, and not against the equitable claimant under such trustee, who, where there is such claimant, might be a proper party defendant with the United States, but not a necessary one.

We therefore contend, as legal propositions,

FIRST:—That the Act of August 15, 1894, under which claimant instituted this suit, is not applicable to the case in hand, and the Court has no jurisdiction of the subject matter.

SECOND:—That the United States is a necessary defendant and not being before the Court, no binding decree can be entered herein.

THIRD:—That the complaint does not state facts sufficient to constitute a cause of suit, in that it fails to all ge residence by the complainant on the roservation at the time of the Allotment Act, and shows upon its face that her claim for this allotment was decided against her by the Secretary of the Interior in 1891, long prior to the passage of the Act under which she is now suing, and when the sole authority for settling disputes concerning allotments rested with the Secretary of the Interior.

As matters of fact we contend that complainant has failed to prove the allegations of her complaint, in that there is no competent proof of her tribal relations, as alleged, The preponderance of the testimony being against her contention, and no evidence that she ever resided upon the lands in controversy or selected them for allotment prior to the appellant's allotment thereon, and for the further reason that she has since waived all claims whatsoever, by voluntarily selecting other lands and having them allotted to her and entering into the possession and enjoyment thereof.

The importance of the questions to be determined in this case and their far-reaching effect upon the Indians in unsettling the status of their allotments made prior to the passage of the Act of August 15, 1894, makes this a case of great import, and warrants that careful, conscientious consideration of all its phases which we know will be given it by this Honorable Court. Feeling as we do that the interpretation contended for by us of the laws discussed herein is in accordance with the will of Congress in enacting them, we also feel that the best interests of the defendant and all Indian allottees, and the United States and the allotting power and trustee, will be properly protected and justice maintained by such interpretation.

A very careful study of the decisions of the Lower Courts herein impels us to the belief that the arguments herein advanced were not made before the Lower Courts, in which we did not appear, and sufficient consideration was not given to the case as one of such far-reaching import-

ance, and especially so regarding the proper interpretation and application of the laws upon which the complainant bases her claim.

Knowing that every phase of the case as here presented will be most carefully considered by this Honorble Court, we confidently place the cause with it for determination.

Respectfully submitted,

SAMUFL HERRICK
and HAILEY & DOWELL,
for Appellant.